No. 3898

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED (a corporation),

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J. SWEENEY, copartners doing business under the firm name of Larzelere, Sweeney Company,

Defendants in Error.

ORAL ARGUMENT OF ALFRED J. HARWOOD IN REPLY TO BRIEF FOR DEFENDANTS IN ERROR.

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Subject Index

Page

1. Contract did not call for the departure of vessel on March 10th..... 2

2. Testimony shows onions on board by March 10th..... 4

3. In order to constitute shipment not necessary that the goods be put on board..... 7

4. Plaintiff performed its contract and is not responsible for delay caused by indirect course followed by vessel.. 15

Table of Cases Cited.

Pages

Baldwin v. Sullivan Timber Co., 142 N. Y. 279..... 5
Bulkley v. Cotton Co., 24 How. 386..... 9
Burdoin v. The Harriet Smith, Fed. Cas. No. 2147 (a).... 6

Campbell v. The Sunlight, Fed. Cas. No. 2368 (2 Hughes) 7
Comptoir Commercial Anversois v. Power, 1 K. B. (1920) 868 14

Delaware v. Oregon Iron Co., 14 Wall. 579-602..... 10

Guffey v. Alaska P. S. S. Co., 130 Fed. 276.....7, 11

Ledon v. Havemeyer, 121 N. Y. 179, 184..... 17

Marlborough Hill v. Cowan & Sons, (1921) 1 A. C. 444.... 15
Missouri v. Patrick, 144 Fed. 632 (C. C. A.)..... 8

Nord Deutcher Lloyd v. President etc. of Ins. Co., 110 Fed. 420 (C. C. A.)..... 11

Oregon The, Fed. Cas. No. 10,553 (Deady, 179).....6, 10

Peace River Phosphate Co. v. Grafflin, 58 Fed. 550..... 18
Pearce v. The Thomas Newton, 4 Fed. 106..... 10
Petersburg v. Norfolk etc. Co., 172 Fed. 327 (C. C. A.)....6, 13
Pollard v. Vinton, 105 U. S. 9.....7, 13

Scott v. The Ira Chaffee, 2 Fed. 401..... 6
Sloss-Sheffield v. Tacony, 54 Pa. Super. Ct. 11..... 16

Tobias v. Lissberger, 105 N. Y. 404.....3, 15

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* * *

Mr. HARWOOD: I shall now reply to the argument made in the brief of the defendants in error.

The court granted the motion for nonsuit on the ground that the steamer did not depart from Australia on March 10th. The argument of defendants in error on this point appears at pages 17 and following of their brief.

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Defendants in error practically concede that the court was in error. At page 17 of their brief the following statement is made:

> "Defendants concede that if the contract had called for 'shipment March 10th' merely, and

> the onions had been put on board on that day, the fact that the vessel did not depart from Australia for several days thereafter would not afford a valid reason for refusing to accept them on arrival. As was stated in the definitions of shipment quoted above, a provision for shipment by a certain date requires a departure *within a reasonable time thereafter* and not a clearance on the date specified."

The argument that the words "shipment to be effected from Australia by steamer on the 10th of March" mean that the steamer must depart on March 10th is obviously unsound. The plain meaning of the language used is that the shipment was to be accomplished by March 10th and the shipment was accomplished when the onions were delivered to the steamer. The language used does not, as counsel say, "call for something more than shipment."

What the contract called for was a *shipment* on March 10th, nothing more was meant—no departure of the steamer by March 10th was stipulated for.

Counsel says that the word "from" implies a departure or separation. The contract called for a shipment from Australia to San Francisco and when the goods were *shipped* they were shipped *from* Australia.

"Shipment" means the delivery of goods to the carrier for transportation *from* the place of shipment to the place of destination.

"Shipment March 10th" means exactly the same as "shipment to be effected from Australia on

March 10th." In the contract between the parties they used a few more words to express their meaning—that is all.

Counsel cite *Tobias v. Lissberger,* 105 N. Y. 404, where the contract called "for prompt shipment by sail from Europe and for delivery on dock at the port of New York". In that case the seller delivered the goods to a vessel at Stettin, a city on a river forty miles from the sea. *When the goods were delivered to the ship the river was ice bound.* This was not a shipment at all. Bouvier defines a shipment as

> "the delivery of the goods within the time required on some vessel which the seller has reason to suppose *will sail within a reasonable time.*"

In the case cited by counsel the seller, in view of the fact that the river was ice bound, did not have reason to suppose that the ship would sail within a reasonable time.

But in the case at bar the vessel was scheduled to sail on March 10th, and no conditions existed at Melbourne which made it impossible to sail within a reasonable time after that date.

The case cited by counsel would be analogous to this case if the river had frozen up after the goods were delivered to the ship.

As said by the court in the case cited by counsel,

> "shipment cannot be said to have been made from Europe when the port selected has no passage way or outlet."

The evidence shows that when the space for the onions was reserved and when they were shipped the vessel was scheduled to sail from Melbourne to San Francisco. Therefore in no event could the fact that the ship touched at Sydney be important. Even if the plaintiff had known that the vessel intended to stop at Sydney, which is in the direction of San Francisco (and the evidence shows that plaintiff did not know this when the shipment was made), such knowledge would be immaterial. The meaning of the word "shipment" itself answers this contention. *Bouvier* defines shipment as

> "the delivery of the goods within the time required on some vessel which the seller has reason to suppose *will sail within a reasonable time.*"

Even if the seller had known that a vessel scheduled to sail from Melbourne on March 10th intended to stop at Sydney on its way to San Francisco, he would still have reason to suppose that the vessel would sail from Australia within a reasonable time after March 10th.

Counsel have several times used the expression "an effective shipment as called for by the contract". But the contract does not call for an "effective shipment". The proviso is merely that shipment should be effected on March 10th.

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The next contention is that the onions were not put on board by March 10th.

The witnesses testified that the delivery of the onions *to the steamer* was commenced late in February and completed on March 7th.

In their reply brief counsel contend that the testimony does not show that the onions were "loaded on board" by March 10th, and in this connection it is contended that goods are not shipped until they are loaded on board.

As to the first contention. In their brief counsel say at page 12:

> "when Shea testified that the delivery was completed on March 7th all that his testimony can be construed to mean is that on that day, plaintiff parted with possession of the onions, and the agents of the steamer took possession of them either on the dock, at ship's tackle or alongside the steamer, for the purpose of afterwards putting them on board."

But Mr. Shea did not testify that he delivered the onions to the agents of the steamer on the dock or alongside the ship, but that he completed the delivery of the onions *to the steamer on March 7th.*

The ordinary meaning of the language used is that the onions were put on board the steamer.

Counsel say that the case of *Baldwin v. Sullivan Timber Co.*, 142 N. Y. 279, does not bear out our claim as to the meaning of the expression "delivered to the steamer."

The case was cited as authority to the effect that the ordinary meaning of the expression "delivered to the steamer" means a loading on the vessel. The

words were given that meaning in the case cited. The fact is that this is the ordinary manner in which a loading on board is described. It is almost the universal custom to describe it in that way.

In *Scott v. The Ira Chaffee,* 2 Fed. 401, the court said:

> "There is abundance of *authority* to the effect that the obligation of the cargo to the ship and of the ship to the cargo does not arise until the cargo, or some portion of it, has been loaded on board, or at least legally *delivered to the vessel.*"

In *Petersburg v. Norfolk etc. Co.,* 172 Fed. 327 (C. C. A.), the court said:

> "The supply was not completed until the *delivery to the ship* where they lay."

In *Burdoin v. The Harriet Smith,* Fed. Case No. 2147 (a) the court said:

> "Giving goods to the mate of a vessel for transportation and taking his signed receipt therefor is a good *delivery to,* and binds, the vessel."

In *The Oregon,* Fed. Case No. 10,553 (Deady, 179) the court said that where the vessel was unable to reach the wharf and the goods were delivered to a steamboat to be transported to the vessel:

> "A delivery of goods under such circumstances *to the steamboat* for the purpose of being conveyed by said steamer, is a delivery *to the latter,* and she is thenceforth bound for their safe carriage and timely delivery."

In *Campbell v. The Sunlight,* Fed. Cas. No. 2368 (2 Hughes), the court said:

> "Delivery of *cargo to a lighter* for shipment on the vessel is a good delivery and binds the vessel."

In the *Century Digest,* title "Shipping," Sec. 411, the title of the section is "Delivery to Vessel."

This Court in *Guffey v. Alaska P. S. S. Co.,* 130 Fed. 276, several times used the expression "delivery to the ship" and meant thereby a loading of the goods on the ship.

In order constitut shipment is not nec sary that goods be on board.

But counsel are entirely in error when they say that goods are not *shipped* until they are placed on board.

Even if counsels' construction of the testimony quoted above were correct (and plainly it is not) there would nevertheless be a shipment before March 10th.

In *Pollard v. Vinton,* 105 U. S. 9, the Supreme Court held that when goods are delivered to the carrier although not placed on the vessel the contract of carriage has commenced and a bill of lading may be issued. The court said:

> *"Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel.* Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods *must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the*

> *contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding.* But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one."

So in this case the bill of lading could have been issued on March 7th and the fact that it was not actually issued until March 12th is immaterial.

Moreover, it is not necessary that a bill of lading be given at all—an oral contract for the carriage of the goods and the delivery of the goods to the carrier constitute a shipment.

Missouri v. Patrick, 144 Fed. 632 (C. C. A.).

In *Petersburg S. S. Line v. Norfolk Etc. Co.*, 172 Fed. 326 (C. C. A.) the Circuit Court of Appeals held (syllabus):

> "The claimant owned the steamer Pokanoket, which it operated between Petersburg and Norfolk, Va. Claimant's agent at Petersburg solicited cargo and signed bills of lading; the master being a pilot, charged only with the navigation of the vessel. The agent received from libelant, *at claimant's wharf in Petersburg,* 275 bags of peanuts for carriage to Norfolk on the steamer, and issued a bill of lading therefor. Owing to a freshet, causing an obstruction in the river, the steamer could not reach the wharf, and the agent employed a lighter, which came into collision with an obstruction, and a part of the peanuts were lost and damaged before the lighter reached the steamer. Held, *that the reception of the goods at the wharf was a delivery to the vessel,* and that she was liable in rem for any loss recoverable."

The court said (p. 323):

> "The shipper fully parted with the possession of the goods when he delivered them at the wharf, and had no longer any control or right of control over them."

The Circuit Court of Appeals quoted from *Parsons on Shipping and Admiralty,* page 183, as follows:

> "The reception of the goods by the master on board the ship or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship for the safe carriage and delivery of the goods."

The Circuit Court of Appeals also cited *Bulkley v. Cotton Co.,* 24 How. 386, where the Supreme Court held that the delivery of cotton to a lighterman was a delivery to the master. The Supreme Court said:

> "There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability." (The liability referred to is the liability of the ship for the loss of the goods shipped.)

The Supreme Court further said:

> "We do not see why the lien may not attach when the cargo is delivered to the master for shipment, before it reaches the hold of the vessel."

In the above case the Supreme Court held:

> "No well-founded distinction can be made, as to the liability of the owner and vessel, between

the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case of the lading of the goods upon the deck of the vessel."

In *Pearce v. The Thomas Newton,* 4 Fed. 106, the court said:

"The owner of the cargo has a lien upon the ship for safe delivery of the same, as much as the ship owner has upon the cargo for freight. *The Maggie Hammond,* 9 Wall. 435. This lien begins upon the receipt of the goods for shipment. *Upon such a receipt the goods are 'shipped'.* 1 *Pars. Mar. Law,* 132 *Conk. Adm.* 151. The court therefore holds that the responsibility of the Thomas Newton began on Thursday, when her agents and owners received the goods."

In *The Oregon,* Fed. Cas. No. 10,553 (Deady 1, 179), the court said:

"Where a vessel is discharging and taking on cargo at a wharf, a delivery of goods thereon by the direction of the master, for the purpose of carrying upon the same, is a delivery to such vessel, and her responsibility for their carriage and delivery starts from that time."

In *Delaware v. Oregon Iron Co.,* 14 Wall. 579-602, the Supreme Court said:

"Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel, if the goods were loaded on board, or *were actually delivered into the custody of the master;* but it is well settled law that the owners are not liable if the party

> to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board *or delivered into the custody of the carrier or his agent.*"

Many of the cases are cited and quoted from in the decision of this court in *Guffey v. Alaska P. S. S. Co.,* 130 Fed. 271 (C. C. A.). In that case this court held that the liability of the ship for the carriage of the goods attaches when the goods are delivered to the owners in the presence of the ship. Even assuming that the testimony of Mr. Shea that he completed the delivery to the "Waitotara" on March 7th does not mean that the goods were delivered on board the vessel, it must mean that they were delivered to the owners *in the presence* of the vessel. Mr. Shea testified that he commenced to deliver the onions to the steamer late in February and that the delivery was completed on March 7th (Tr. p. 60).

In the *Guffey* case the steamer was either at Nome or on the high seas when the goods were delivered to the charterer of the vessel. The bill of lading mentioned no vessel in which the goods were to be shipped and gave the charterer the right to carry on any of the company's vessels. The company to whom the goods were delivered was not the owner of the vessel.

In *Nord Deutcher Lloyd v. President etc. of Ins. Co.,* 110 Fed. 420 (C. C. A.), the Circuit Court of Appeals held that when goods were delivered to

lighters to be delivered to the ship the bill of lading is applicable to the goods as soon as they were placed on lighters.

The definition of "shipment" in *Bouvier* refers to the delivery "on the vessel". This is a short definition. In commercial usage, in this country at least, the word "shipment" by extension has come to mean also the delivery of the goods at the wharf for loading on a specific ship.

Counsel say that the citation of 1 *Hutchinson on Carriers,* Sec. 113, is not in point

> "as that section deals only with the question of when the vessel's liability as a common carrier attaches, and does not touch on the question of shipment."

Now counsel could not have reflected before they made this statement. *A vessel's liability as a common carrier never attaches until there has been a shipment.*

The distinction sought to be drawn by counsel finds no support either in reason or authority. Counsel in effect contend that when goods are delivered at the wharf into the custody of the master or owner for loading on the ship and the lien of the ship on the cargo and the lien of the cargo on the ship have attached, that there has not been a shipment because the owner has not yet put the goods on board.

Counsel's contention is directly at variance with the decision of the United States Supreme Court in

Pollard v. Vinton, 105 U. S. 9, which I have already cited and quoted from. In that case the Supreme Court directly held that goods are shipped *as soon as the power to make a bill of lading arises,* and that the power arises *when the goods come within the custody of the officers of the ship for the purpose of loading, although they may not actually have reached the deck of the vessel.* The Supreme Court said:

> *"Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel.* Only then could there be a shipper, and only then could there be goods shipped. *In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding."*

In the case of *Petersburg S. S. Line v. Norfolk,* 172 Fed. 326 (C. C. A.), where the goods were delivered to the wharf for loading, the Circuit Court of Appeals said:

> "The shipper fully parted with the possession of the goods when he delivered them at the wharf, and had no longer any control or right of control over them."

Certainly this constituted a "shipment". A "shipment" must be made when the shipper delivers the goods to the ship owner for loading, parts entirely with their custody, and the lien of the ship

attaches to the goods and the lien of the goods attaches to the ship.

Counsel cite three English cases where the courts said that "shipment" meant "shipment on board".

In *Comptoir Commercial Anversois v. Power,* 1 K. B. (1920), 868, one of the cases cited, no question arose as to when a shipment was made. The court merely said incidentally that

> "giving the word 'shipment' the widest meaning of which it is capable it could mean no more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination."

Moreover it appears that the British Bill of Lading Act of 1855 provides, in effect, that a bill of lading shall not be issued until the goods were "laden on board the vessel". (3 K. B. 450, 1921.)

These cases are not authority in this country in view of the decisions of our Supreme Court. Nor does it appear that any English court ever held that a delivery on the dock to the carrier for loading is not a shipment—that is where the goods are delivered to a carrier for loading on a particular ship which is in port and on which the carrier had agreed to transport the goods.

But the Privy Council of England has recently held that it is not necessary that the goods should be loaded on board the vessel, especially in a case like this where the shipment is by a "general ship" and not a ship chartered for a special bulk cargo.

The case referred to is *Marlborough Hill (ship) v. Cowan & Sons* (1921) 1 A. C. 444, where Lord Phillimore said:

> "Their Lordships are not disposed to take so narrow a view of a commercial document. To take the first objection first. *There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail.* The two forms of a bill of lading may well stand, as their Lordships understand that they stand, together. *The older is still the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas 'received for shipment' is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.*"

Plaintiff performed its contract and is not responsible for delay caused by indirect course followed by vessel.

The next point is that the motion for a non-suit should have been granted because of the indirect course which the vessel followed.

In their reply brief counsel here again referred to the case of *Tobias v. Lissberger,* 105 N. Y. 412, where the goods were delivered to a vessel in an ice bound port. Counsel say

> "There is no essential difference between shipment on an ice bound vessel which could

> not sail on time and shipment on a vessel which followed the route taken by the 'Waitotara'."

But there is all the difference in the world. In the case at bar plaintiff believed that the ship would sail direct to San Francisco on March 10th, or within a reasonable time thereafter; whereas in the *Tobias* case the seller knew that the river was frozen over and that the ship could not sail within a reasonable time. In the *Tobias* case there was *no shipment* at all.

Counsel cite *Sloss-Sheffield v. Tacony,* 54 Pa. Super. Ct. 11, where eight months elapsed between the shipment of the goods in Alabama and their arrival in Pennsylvania. This delay was not explained by the shipper. The court merely held that the delay in making the delivery imposed upon the seller the burden of showing that the cause of the delayed delivery was not under his control.

Just why this case is cited is not apparent for it is obvious that in the case at bar the route followed by the "Waitotara" was not under the control of the plaintiff. The plaintiff showed that the steamer delayed its departure for six days and followed an indirect route, but in the case cited no explanation was offered of a delay of eight months in shipping goods a few hundred miles by rail.

This superior court case is the only case discovered by counsel which even intimates that where shipment is made at the time stipulated for by the contract the delivery must be within a reasonable time after

the shipment. Such cannot be the law. In any event the case is not authority here for in this case it was shown that the plaintiff had no control over the cause of the delay.

In counsels' brief no mention is made of the cases cited in brief of plaintiff in error at page 26 *which hold that where shipment is made at time stipulated in the contract the vendee is bound to accept and pay for the goods although there was delay in delivery.*

It is immaterial whether the carrier is the agent of the seller or the agent of the buyer or whether title passes when the goods are shipped or when they are delivered at destination.

In the leading case of *Ledon v. Havemeyer,* 121 N. Y. 179, 184, cited in the brief the court declined to pass upon the question as to whether the title to the goods passed to the vendee when they were shipped or when they were delivered at destination. The court said:

> "It is unnecessary to decide this question as it has no controlling influence over the signification of the word 'shipment' as used in the contract. That question, we think, is made clear by general usage and the uniform course of authority on the point. There is nothing in the language used in the contract, or in the surrounding circumstances, to indicate that the vendors were expected to exercise any control over the clearance of the vessel, or her subsequent management."

In the case of *Peace River Phosphate Co. v. Graf-flin,* 58 Fed. 550, which is also cited in my brief at page 26, the contract of sale, like the contract in the case at bar, provided for payment on delivery. It was contended that the seller could not recover because of the delay in the arrival of the cargo. In overruling this contention the court said (page 551):

> "The contract contains nothing as to when the delivery is to be made, but only as to the time of shipment; and the special agreement alleged in the declaration alleges an agreement with respect to the chartering and sailing of the two vessels mentioned, and not as to their arrival. It would appear, therefore, that if the shipments were made in due time, as stipulated by contract or by special agreement, the plaintiff was not responsible for delay in their arrival."